No. 3377

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIM CHAN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the port of San Francisco,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

This appellant respectfully petitions this court for a rehearing of the judgment filed herein on the 2nd day of February, 1920, wherein the decree of the lower court was affirmed. In its opinion this court held that the principle involved in the case of Quan Hing Sun v. White, 254 Fed. 402, and Jeung

Quey How v. White, 258 Fed. 618, could not be invoked upon behalf of this appellant for the reason that it was not specifically assigned as error, and citing as authority the recent cases of Jeung Bock Hong et al. v. White, 258 Fed. 23, and Louie Share Gan v. White, 258 Fed. 798. In this connection appellant refers to the order submitting the demurrer to the petition as contained on page 14 of the Transcript, wherein the immigration record was by consent deemed to *"be considered as part of the original petition"*. It therefore is apparent that plain error was committed and involved in the proceeding as pending before the lower court, and that the four general assignments of error as contained on page 21 of the Transcript were therefore sufficient assignments to sustain the point made, because it appeared upon the face of the immigration record, which by stipulation was deemed an *amendment to the petition* that the detained had not been given a hearing before a Board of Special Inquiry.

This court, in the case of Hopkins v. Fachant, 130 Fed. 839, affirmed the discharge of a woman from custody upon a ground which not only was not involved in the record of the case as made up before the lower court, but upon a ground which actually took place after the case was at issue, and hence could have no part in the pleadings, and it is therefore felt that where this court has actually in practice sanctioned the recognition of an error brought

to its attention upon the hearing even though not involved in the pleadings, that it should in the present case recognize and render assistance to this appellant, where the error complained of was patent upon the face of the immigration record which by the said stipulation was deemed part and parcel of the original petition.

2 Cyc. 678 the doctrine is asserted that:

> "An exception to the general rule that an appellate court will not consider objections first raised on appeal—exists in the case of errors apparent on the face of the record; these may be considered by the court, though not objected to below."

See, also:

2 Cent. Dig., title Appeal and Error, Sec. 1145 et seq.;

Bennett v. Butterworth, 11 Howard 669; 13 L. Ed. 859;

Garland v. Davis, 4 How. 131; 11 L. Ed. 907;

Kentucky L. Ins. Co. v. Hamilton, 63 Fed. 93.

2 Cyc. 715 it is stated:

> "But where error appears in the record proper, the appellate or reviewing court may correct it notwithstanding that no exception was taken thereto."

See, also, to the same effect

2 Cent. Dig. title "Appeal & Error", Sec. 1147;

Macker v. Thomas, 7 Wh. 530; 5 L. Ed. 515.

When the entire record is brought up, as in the case at bar, the immigration record being by stipulation, a part of the pleadings, the court may reverse upon a defect not noticed in the court below, and even of its own motion, one not pointed out by counsel.

Garland v. Davis, supra.

It has also been held by our highest court that if error is apparent upon any part of the record, it is open to review, whether found in the bill of exceptions or elsewhere.

Suydam v. Williamson, 20 How. 427; 15 L. Ed. 978.

The Supreme Court has also held many times that an appellate court will notice a plain error in the record even though there be no specific assignment of error, and that there was no presumption in favor of a judgment where error is apparent in the record.

Wiborg v. U. S., 163 U. S. 632;
Rowe v. Phelps, 152 U. S. 87;
Stevenson v. Barbour, 140 U. S. 48;
United States v. Pena et al., 175 U. S. 500;
Reynolds v. U. S., 98 U. S. 145;
U. S. v. Wilkinson, 12 How. 246.

In finally submitting this motion we feel that the court possibly did not note the stipulation that the immigration record was deemed part and parcel of the petition, thus making it in effect a part of the pleadings and bringing it within the protec-

tion of the rules and principles herein contended for, and that therefor the motion for a rehearing should be granted.

Dated, San Francisco,
March 1, 1920.

Respectfully submitted,

GEO. A. MCGOWAN,
HEIM GOLDMAN,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
March 1, 1920.

GEO. A. MCGOWAN,
Of Counsel for Appellant and Petitioner.